

MONTANA LEGISLATIVE HISTORY

Chapter 404 19 95

Bill H 158 S _____

Original bill & history ✓ c

H. Committee on Judiciary

Hearing Date(s) Jan 23 ✓ c

Jan 22 ✓ c

_____ c

_____ c

Date Out Jan 22 ✓ c

S. Committee on Judiciary

Hearing Date(s) Mar 02 ✓ c

Mar 02 ✓ c

_____ c

_____ c

Mar 08 ✓ c

Did this bill originate in an interim committee? ____ Yes ____ No

Committee _____

Report _____

1
2 INTRODUCED BY Daniel J. Hays House BILL NO. 158
3 Donnell W. Ryan
4 Island

5 A BILL FOR AN ACT ENTITLED: "AN ACT REVISING THE STATE SCAFFOLDING LAWS; AUTHORIZING THE
6 USE OF COMPARATIVE NEGLIGENCE LAW IN DETERMINING LIABILITY; AMENDING SECTION 50-77-101,
7 MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

8 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

9
10 **Section 1.** Section 50-77-101, MCA, is amended to read:

11 **"50-77-101. ~~Construction of scaffolds~~ Scaffolds -- definition -- safety practices.** All scaffolds
12 erected in this state for use in the erection, repair, alteration, or removal of buildings shall be well and safely
13 supported, of sufficient width, and properly secured so as to ensure the safety of persons working on them
14 or passing under them or by them and to prevent them from falling or to prevent any material that may be
15 used, placed, or deposited on them from falling (1) As used in this part, "scaffold" or "scaffolding" means
16 a temporarily elevated platform and its supporting structure that is used for supporting a person, material,
17 or both. The term does not include a ladder or other mobile construction equipment.

18 (2) A person working on or near a scaffold shall follow the safety practices commonly recognized
19 in the construction industry and the safety regulations required by the person's employer."

20
21 **NEW SECTION. Section 2. Liability of employer for negligence -- exceptions.** (1) A contractor,
22 subcontractor, or builder who uses or constructs a scaffold on a construction site is liable, subject to the
23 application of 27-1-702, for damages sustained by any person, except a fellow employee or immediate
24 employer, who uses the scaffold when the damages are caused by the negligence of the contractor,
25 subcontractor, or builder in the use or construction of the scaffold.

26 (2) If a person dies from an injury caused by the negligent use or construction of a scaffold, the
27 right of action survives and may be prosecuted and maintained by the decedent's heirs or personal
28 representatives.

29
30 **NEW SECTION. Section 3. Codification instruction.** [Section 2] is intended to be codified as an

1 integral part of Title 50, chapter 77, part 1, and the provisions of Title 50, chapter 77, part 1, apply to
2 [section 2].

3

4 NEW SECTION. **Section 4. Effective date.** [This act] is effective on passage and approval.

5

-END-

4/11	2ND READING FREE CONFERENCE COMMITTEE REPORT NO. 1 ADOPTED	95	4
4/12	3RD READING FREE CONFERENCE COMMITTEE REPORT NO. 1 ADOPTED	95	5
	SENATE		
4/04	FREE CONFERENCE COMMITTEE APPOINTED		
4/10	FREE CONFERENCE COMMITTEE REPORT NO. 1		
4/11	2ND READING FREE CONFERENCE COMMITTEE REPORT NO. 1 ADOPTED	39	11
4/12	3RD READING FREE CONFERENCE COMMITTEE REPORT NO. 1 ADOPTED	38	11
4/18	SIGNED BY SPEAKER		
4/18	SIGNED BY PRESIDENT		
4/18	TRANSMITTED TO GOVERNOR		
4/26	SIGNED BY GOVERNOR		
	CHAPTER NUMBER 550		
	EFFECTIVE DATE: 10/01/95		

INTRODUCED BY FUCHS, ET AL.
REVISE THE STATE SCAFFOLDING LAWS

1/12	INTRODUCED		
1/12	FIRST READING		
1/12	REFERRED TO JUDICIARY		
1/23	HEARING		
1/31	COMMITTEE REPORT—BILL PASSED AS AMENDED		
2/02	2ND READING PASSED AS AMENDED	94	5
2/04	3RD READING PASSED	90	8
	TRANSMITTED TO SENATE		
2/06	FIRST READING		
2/06	REFERRED TO JUDICIARY		
3/02	HEARING		
3/09	COMMITTEE REPORT—BILL CONCURRED AS AMENDED		
3/13	2ND READING CONCURRED	49	0
3/14	3RD READING CONCURRED	45	5
	RETURNED TO HOUSE WITH AMENDMENTS		
4/06	2ND READING AMENDMENTS CONCURRED	92	3
4/07	3RD READING AMENDMENTS CONCURRED	93	3
4/10	SIGNED BY SPEAKER		
4/11	SIGNED BY PRESIDENT		
4/11	TRANSMITTED TO GOVERNOR		
4/13	SIGNED BY GOVERNOR		
	CHAPTER NUMBER 404		
	EFFECTIVE DATE: 04/13/95		

INTRODUCED BY TREXLER

ALLOW AN ELECTION ADMINISTRATOR TO CANCEL AN ANNUAL ELECTION
IN WHICH THERE IS NO FILED CANDIDATE AND ALLOW A GOVERNING
BODY OF A POLITICAL SUBDIVISION OF A COUNTY TO MAKE
APPOINTMENT TO THE PUBLIC OFFICE

1/12	INTRODUCED
1/12	FIRST READING
1/12	REFERRED TO LOCAL GOVERNMENT
1/17	HEARING
1/26	TABLED IN COMMITTEE
2/23	MISSED TRANSMITTAL DEADLINE
	DIED IN COMMITTEE

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AVAILABLE

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HEARING ON HB 158

Opening Statement by Sponsor:

REP. DANIEL C. FUCHS, HD 15, opened the hearing on HB 158 by distributing a proposed amendment. **EXHIBIT 1** He gave a history of the Montana Scaffold Act and said the intent of the bill is not to change the safety requirements, but it will permit contractors the opportunity to present the court with information about their side in a scaffold injury case.

Proponents' Testimony:

Mike Young, Great Falls Trial Lawyer, said the intent of the bill is to interject modern-day, common-sense language into the Montana Scaffolding Act since its passage and genesis. He said it does not affect employers or fellow employees who are immune under the Workers' Compensation Act. The basic type of claim this is designed to get is the third-party claim from an employee of a subcontractor or subcontractor of the second degree to a general contractor. He gave examples of the types of things they are trying to avoid with this bill.

Ron McCullough, Vice President, Sletten Construction Company, Great Falls, said that large and small contractors throughout the state representing commercial, residential, industrial and highway contractors support this bill. This bill would not change safety regulations contractors are bound to live by. It can be the negligence of a person which can cause injury for which a contractor can be held liable even if the scaffold is built by all the safety standards.

Lorrin Darby, General Manager, Cogswell Agency, supported HB 158. He said that under the current law, the general contractor has no recourse. Because of the lack of comparative negligence language in the law, insurance companies have just settled because they have no defense.

Bill Bouret, Great Falls Insurance Agent, Cogswell Agency, gave examples of accidents which have occurred with general contractor customers and supporting information of HB 158.

James Smith, First West, Inc., Bozeman, supported the concerns and testimony of the previous proponents. His major concern is the availability of insurance and he described a current situation at his agency.

Roger McGinnis, Executive Director, Independent Insurance Agents of Montana, stood in support of this bill as well as the proposed amendments.

Ron Ashab, State Farm Insurance Company, said that a homeowner is not immune from the scaffolding act.

Carl Schweitzer, Montana Contractors Association, echoed the comments previously made in support of this bill.

Opponents' Testimony:

Darrell Holzer, AFL/CIO, spoke in opposition to HB 158 in its current form. He said the problem of injuries result from the ongoing, unrelenting demand for increased productivity causing the employee to attempt a short cut to help expedite the process. He said he would submit an amendment for the committee's consideration relative to his various concerns with the bill.

Russell Hill, Montana Trial Lawyers Association, opposed HB 158. He submitted written testimony outlining that opposition.
EXHIBIT 2

Informational Testimony:

EXHIBIT 3 was submitted as supplementary and corrected testimony for HB 158.

{Tape: 1; Side: A; Approx. Counter: 46.0}

Questions From Committee Members and Responses:

REP. BRAD MOLNAR asked if Mr. Holzer wanted to include a safety program in his amendment.

Mr. Holzer thought that was absolutely essential.

REP. MOLNAR asked if there is a safety training program included in the apprenticeship program.

Mr. Holzer answered, "Absolutely."

REP. MOLNAR asked if he would be willing to say in the amendment that because they are already trained, if they hire a union employee, they don't have to go through the training program because they have already been instructed.

Mr. Holzer said he would have some difficulty with that because safety training needs to be an ongoing upgrading program.

REP. MOLNAR asked him if he was familiar with the scaffold section in OSHA.

Mr. Holzer said he was.

REP. MOLNAR asked if that does not sufficiently define the safety practices which people would come under regardless of the state law.

Mr. Holzer was a strong proponent of the OSHA laws, but the reality of it is that there are so few OSHA inspectors that only

once every 75 years can the average work place be inspected unless someone raises the issue and specifically requests an OSHA inspection.

REP. AUBYN CURTISS asked if this could be cleared up by an amendment which would define the difference between a ladder and a scaffold.

Mr. Hill said if that is what the proponents want, they would have come in with an amendment which said a ladder is not a scaffold. He felt that would be a legitimate alternative.

REP. CURTISS asked if he thought that would help some of the problems that the proponents have with the bill.

Mr. Hill replied that if they started from scratch and simply defined ladders as being different from scaffold, it would be a great improvement.

REP. DUANE GRIMES inquired if the current statute implies the strict liability Mr. Hill testified to.

Mr. Young cited several scaffold cases to prove that anytime there is a violation of the scaffolding act and there is causation, strict liability exists. He means by that that the defense of comparing or contributory negligence is barred. This bill has nothing to do with workers' compensation, or with trying to repeal the Safe Place To Work Act, or with trying to redo safety practices in the industry. In every case he has been involved with, the safety regulations are being followed, but things do happen which cause scaffolding injuries. The intent is to make those pressures and choices a jury issue.

REP. GRIMES asked Mr. Schweitzer why this bill would not result in a loosening of the standards and increase negligence on the part of the contractors.

Mr. Schweitzer believed they were not touching the OSHA standards. All the safety standards would remain in place that are required to erect a scaffolding properly.

REP. DEB KOTTEL asked if negligence per se and strict liability were two different concepts in the law.

Mr. Young answered, "Yes."

REP. KOTTEL asked if it was his opinion that the state of the law today is that the scaffolding law imposes a strict liability duty.

Mr. Young replied, "Yes, if there is causation."

REP. KOTTEL asked him to elaborate on his answer.

Mr. Young said there has to be a breach of duty, a breach of the act.

REP. KOTTEL said when going to the issue of breach of duty under a negligent standard, she wondered if that wouldn't be back to the idea of "not strict liability" because there is a finding of a breach of duty and that is an issue of trial.

Mr. Young explained that if there is a violation of the act or OSHA violations applying to the act or Department of Labor regulations applying to the construction of scaffold, there is a breach of duty if there is also causation.

REP. KOTTEL interrupted with, "So, therefore, you do have to find a falling below the standard of care."

Mr. Young continued, "You have to find a violation, you have to find causation. At that point, where this litigation differs from other litigation (other than that against the Burlington Northern) is that you do not get to compare and to get an offset for the employee's own negligence, if any."

REP. KOTTEL desired clarification that this statute does not set up grounds where there can be a liability without any fault; i.e., there is still a finding in these cases of an employer, contractor, etc., falling below some standard of care.

Mr. Young said it has the same affect as strict liability.

REP. KOTTEL inquired if the change in language relating to exercising reasonable care in the matter of scaffolding to a statutory duty to following industry standards becomes the intent to set the standards of care by standards of non-profit trade associations.

Mr. Young said, "No."

REP. KOTTEL asked if that is not what this amended bill does.

Mr. Young said that basically if an individual goes to weekly tool box meetings or has an employee safety booklet, or OSHA regulations are posted and they do not follow them, or if there have been tool box meetings on a weekly basis in which safety practices have been covered and a person goes out and does exactly the same as before, that is what that is intended to hold as comparative negligence. The percentage is up to the jury.

REP. KOTTEL recalled testimony that said scaffolding cannot be made 100% safe.

Mr. Young replied that he did not say that. He has seen perfectly compliant scaffolding abused and the general contractor held liable anyway.

REP. KOTTEL asked if scaffolding can be made 100% safe.

Mr. Young answered, "I suspect you can, if everyone uses it as intended." Then he gave example where it was not used properly.

REP. KOTTEL discussed the public policy reasons behind strict liability as being that it is (1) a dangerous activity that cannot generally be made safe, (2) that it is an activity that is not common in all industries, (3) who is best able to control the instrumentality and (4) someone has to pay the price. It is the person in a public policy decision who benefits the most from engaging in this dangerous activity. She wanted to know if all four of those elements are present in this industry.

{Tape: 1; Side: B}

Mr. Young replied that 60 years ago when the scaffolding acts were passed, all four of those elements were present. Since that time workers' compensation has come into play. In addition there has been OSHA for 25 years which has taken over the definition of a scaffold. Taking those factors into consideration, it may be said that this is the time to say that a person has to exert more care in building the scaffold, but in addition, individual fault in using it must be looked at.

REP. KOTTEL asked if he was against strict liability altogether.

Mr. Young said, "No." But in this case, the person has some control over what they say, do, object to and how they might change the environment which is a jury issue under this bill as presented.

REP. KOTTEL commented that as the country moves toward no-fault insurance an anticipated reduction of premiums would be the result. She asked if in moving away from a no-fault situation with strict liability into a fault situation, increased litigation with increased trials and increased costs and premiums would be the result.

Mr. Young said that all of these trials now exist and whether it is a strict liability on a products claim or negligence claim, he did not see anything changing.

REP. LIZ SMITH asked if any standards are now required for the employer to instruct his employee in regards to safety outside of the OSHA regulations. She wanted to know if there was any standardization among the employer contractors that offers education or instruction to the employees regarding safety.

Mr. McCullough said it would fall under the agencies controlled by the contracts such as the Corps of Engineers or some other agency which would have different requirements than OSHA. Individual contractors may have their own safety training issues. There are no requirements other than OSHA.

REP. SMITH asked if they are using a scaffold which has instructions or safety standards for application of use, whether employers are required to instruct their employee.

Mr. McCullough said that OSHA does require instruction on the safe use of equipment.

REP. SMITH asked if he was aware of contractors having some verification that the employee has received that information.

Mr. McCullough said that is based on the individual contractor.

REP. LOREN SOFT posed the situation where a child climbs on the scaffolding after hours and is injured. He asked where the contractor liability lies.

Mr. Young answered that it a totally different legal issue.

REP. SOFT asked if the same holds true if it is an adult involved.

Mr. Young said it would have a different standard of care to compare the negligence of a 10-year-old child with an adult.

REP. LINDA MC CULLOCH asked the sponsor if he would be amenable to the amendment which was discussed with Mr. Holzer.

REP. FUCHS said he would.

REP. GRIMES asked if this includes employees of the general contractor.

Mr. Young replied that on a construction job or any other work place injury, the employee who is injured on the job cannot sue his own employer whether that is a general contractor, subcontractor or a supplier.

REP. GRIMES said the old legislation read, "all scaffolds erected in the state....." and wanted to know if this actually applies to all scaffolds or all scaffolds used on construction sites or by construction.

Mr. Young answered that it applies to all scaffolds including ladders and mechanical hand lifts as defined by the Montana Supreme Court.

REP. GRIMES asked if it would apply to him if he were to use a scaffold on his house.

Mr. Young said, "No," but that it could if the homeowner was acting as a general contractor or furnishing the scaffold.

REP. GRIMES wanted to be sure they weren't inadvertently putting some additional construction industry standards on private individuals.

Mr. Young said this only applies to contractors, subcontractors and builders. The term, builder, may apply to a homeowner under certain circumstances and then they would come under those standards.

REP. CHRIS AHNER requested Mr. Holzer's view on omitting ladders.

Mr. Holzer explained that in the construction industry it is not uncommon to have erected what is called a hanging scaffold which means that it is erected and suspended by cable in some very high locations. Often the only way to get from one point to another on the scaffold is a ladder which is a very integral part of those types of scaffolding situations. To imply there is never any relationship between a ladder and scaffold in the industrial construction industry is not true.

REP. KOTTEL expressed her concern about the language on lines 18 and 19. She asked if a person is given the original material handed out by the American National Standards Institute or OSHA, or National Safety Council and other safety organizations as well as regulations of the employer at a tool box meeting. Further, she asked if those materials being received and read would be the standard of care the employee would be held to.

Mr. Holzer replied that it would not be likely they would be given these documents.

REP. KOTTEL asked if it is sometimes possible that the safety regulations given to an employee by the employer might conflict somewhere with all the regulations disseminated by the non-profit organizations.

Mr. Holzer said he couldn't answer that question.

REP. KOTTEL asked what safety practices are commonly recognized in the construction industry.

Mr. Holzer replied, "OSHA regulations."

REP. KOTTEL asked, "Only OSHA?"

Mr. Holzer replied that not only OSHA but other regulations which the employee may be working under as he had testified before.

REP. KOTTEL asked if all those regulations sometimes conflict with the employer's safety regulations.

Mr. Holzer said those regulations would take precedence over the employer's safety regulations.

REP. KOTTEL recalled he had said in testimony, "It is unlikely that any employee would receive information regarding those other regulations." She asked if that was correct.

Mr. Holzer said, "Not necessarily. In safety meetings those safety regulations and those standards will oftentimes be referenced and talked about."

REP. KOTTEL asked how long those safety meetings last.

Mr. Holzer said they could last anywhere from 15 minutes to 45 minutes depending upon the topic and the contractor. .

Closing by Sponsor:

REP. FUCHS summarized what the bill does with the amendment. He felt the amendment REP. MC CULLOCH had proposed might enhance the bill. He rebutted the opponents' argument about productivity with the statement that most of the workers are on an hourly wage and there is no incentive for them to work faster to make more dollars.

{Tape: 1; Side: B; Approx. Counter: 23.7}

HEARING ON SB 29

Opening Statement by Sponsor:

SEN. SUE BARTLETT, SD 27, brought SB 29, a bill requested by the Department of Social and Rehabilitation Services (SRS) to the committee with the intent of clarifying laws having to do with child support collection.

Proponents' Testimony:

Mary Anne Wellbank, Administrator, SRS Child Support Enforcement Division, identified the purpose of the bill is to clean up problems which they have encountered in processing child support collection enforcement. She "walked" the committee through the various parts of the bill giving history and reasons for the provisions in SB 29. She distributed written testimony from the department's director, Peter Blouke. EXHIBIT 4

Belinda Hamilton, submitted written testimony and recommended amendments to SB 29 from the perspective of the rights and obligations of the payor. EXHIBIT 5

Arlette Randash, Eagle Forum, rose in favor of SB 29 and submitted written testimony. EXHIBIT 6

Laurie Koutnik, Christian Coalition of Montana, said that SB 29 is necessary legislation that not only calls for fiscal responsibility on the part of parents toward their children, but also alleviates some burdens and expenses that are currently covered by the state taxpayers. She felt it also allows those who are administering this program some latitude and sets in place some directives as to how to go about meeting the needs.

{Tape: 1; Side: A}

EXECUTIVE ACTION ON HB 158

Motion: REP. SHIELL ANDERSON MOVED HB 158 DO PASS.

Motion: REP. LINDA MC CULLOCH MOVED AMENDMENTS PROPOSED BY MONTANA STATE AFL-CIO. EXHIBIT 1

Discussion: REP. DANIEL MC GEE said he had no problem with the second amendment, but questioned if the word, "mechanism," included a sidewalk.

REP. MC CULLOCH said she did not believe a sidewalk was a mechanism.

REP. MC GEE contended that it is just as are steps. He did not believe that a ladder should be part of the scaffolding.

REP. MC CULLOCH disagreed with him and recalled testimony that oftentimes a scaffolding was further up on the building, often attached to the building and as way is needed to get there. The vehicle to get to the scaffolding was the ladder and therefore the ladder became part of the scaffolding in order to work from that section. She did not recall that mechanism is meant to be a sidewalk, but the device that gets one to the scaffolding.

CHAIRMAN BOB CLARK suggested separating the amendments for the purposes of discussion and voting. Amendment one was open for further discussion.

REP. DEB KOTTEL asked the staff counsel, John MacMaster, for his interpretation of the word, "mechanism," and whether he agreed that a sidewalk would be considered a mechanism.

REP. MC GEE interjected, "a mechanism used to reach the platform," not just a mechanism.

REP. KOTTEL said the key word was mechanism.

REP. MC GEE said, "No, it's a specified mechanism."

Mr. MacMaster suggested using a typical dictionary to see if that would help. He suggested using the words, "ladder or similar device," which would eliminate a sidewalk.

REP. KOTTEL asked if REP. MC CULLOCH would agree to that change in the amendment.

REP. MC CULLOCH agreed to it.

REP. AUBYN CURTISS remembered testimony that someone had used some kind of elevating device for accessing the scaffolding which

was totally inappropriate and she wondered if the wording should be left in there.

REP. MC GEE said that it was a forklift and in using it the person had fallen and sued the contractor.

REP. CLIFF TREXLER spoke against the amendment. He believed that they had taken the word, "ladder" out of the bill for specific purposes simply because they are not part of the scaffolding and in many cases they are portable.

REP. MC CULLOCH said her point is that if a contractor erected a scaffolding and the only access to it was a ladder or some device to reach it, then the employer had deemed that as part of the scaffolding.

REP. WILLIAM BOHARSKI said the scaffolding is a steel structure with a ladder incorporated into it. If a ladder were leaned against a scaffolding the platform could be knocked off the scaffolding. If the contractor were to set up that sort of structure, the contractor would be misusing the equipment.

REP. BILL TASH asked if these amendments had been discussed with the bill sponsor.

REP. MC CULLOCH said they had not been discussed with the sponsor.

REP. TASH said he would have to speak against the amendments because after the testimony during the hearing many of these issues were explained and adding more amendments now might be adding complexities.

REP. BRAD MOLNAR spoke against both amendments. The original intent of the bill was to take away the legal morass of a safety procedure. These procedures are well-documented and used throughout the industry under OSHA. If it is a hanging scaffold which needs a device to access it, and ladder is going to be incorporated in its definition, then a crane or manlift or a rigging will also have to be incorporated. The intent of the bill was to deal with scaffolding and these items were eliminated to avoid legal contention.

REP. JOAN HURDLE questioned eliminating the device to reach the scaffolding from the necessity of safety standards.

REP. MOLNAR said his reasoning was that ladders, cranes, manlifts, and other types of rigging and devices to reach the scaffold are covered by OSHA. The intent of the sponsors of the bill is to limit the legal liability on a safety measure which at the state level has outlived its usefulness except for suing employers. They are trying to eliminate a double jeopardy.

REP. KOTTEL said testimony showed that the reason they wanted to exclude ladders was one Montana Supreme Court case that held a free-standing ladder against the side of the work was deemed by the court to be a scaffold. She did not hear any testimony that said they didn't consider a ladder which was attached to the scaffold as not part of the scaffolding device. Therefore, she spoke in favor of this amendment which clarifies that free-standing ladders are not included in this act, but when a device is used to reach the scaffold itself, that become part of the scaffolding device. That was her interpretation of their intent.

REP. DUANE GRIMES said the scaffolding act is so broad that they even considered an employee who fell through the roof as being on scaffold. He was worried about the wording of the amendment which again makes it again very broad and subjective. He spoke against the amendment.

REP. MC CULLOCH restated the amendment and felt it was specifically directed toward hanging type ladders.

REP. MC GEE explained that scaffold by definition has the ladder necessary to get to the platform as an integral part of the scaffold. Therefore, any other ladder that is leaned up against the scaffolding would be superfluous, not part of the scaffolding and if a person falls off another ladder to get to the scaffolding when the integral ladder is available, that would be using a device beyond the intended purpose of the scaffolding. He spoke against the amendment.

REP. KOTTEL asked if the committee would ask the question regarding the support of the amendment by a member of the audience who was involved in drafting the bill.

REP. MC GEE objected.

Vote: Motion failed on voice vote.

Motion: REP. MC CULLOCH MOVED THE SECOND AMENDMENT. EXHIBIT 1

Discussion: REP. MC CULLOCH explained the reasoning behind the amendment and recalled that the sponsor had agreed to such an amendment.

REP. ANDERSON urged the committee to vote against this amendment because it would make a law which would say "you have to follow the law." He felt it was unnecessary and redundant.

Vote: The motion failed 6 - 12, REPS. CAREY, MC CULLOCH, DEBBIE SHEA, KOTTEL, LIZ SMITH and HURDLE voting aye.

Motion: REP. MC GEE MOVED THE SPONSOR'S ORIGINAL AMENDMENTS.
EXHIBIT 2

Discussion: REP. HURDLE asked who was included when a "fellow employee or immediate employer" are excepted.

REP. MC GEE said he believed this was the language used in law regarding liability issues.

REP. BILL CAREY asked Mr. MacMaster to share his view with the committee.

Mr. MacMaster said he believed this amendment was written by the lawyer who testified at length on the bill. He did not believe it added to the but merely was the lawyer's preference in wording the sentence.

REP. MOLNAR said that every drafter of a bill has a right to have it worded as they see it and for that reason, he wanted to adopt the amendment and pass the bill out of committee.

Vote: The motion carried 16 - 3, REPS. KOTTEL, MC CULLOCH and HURDLE voting no.

Motion: REP. MC GEE MOVED HB 158 DO PASS AS AMENDED.

Discussion: REP. CAREY referred to written testimony dated January 23, 1995, by Russell Hill. EXHIBIT 3 His concern was on the second paragraph of page 1 that the bill would "remove whole categories of employees from Montana's workers' compensation." He asked Mr. MacMaster to comment.

Informational Testimony: A letter dated January 26, 1995, submitted by Mr. Hill is included as information testimony.
EXHIBIT 4

{Tape: 1; Side: A; Approx. Counter: 31.7}

Mr. MacMaster said he agreed with most of what Mr. Hill said on it, but did not agree with this particular point. He did not believe the bill could remove employees from workers' compensation if the employer covers them. The state Constitution says that a person has a right to sue anybody in negligence, but a person can't sue their employer if the employer has provided workers' compensation. In the case of an employee who has a scaffolding act type of accident, if the employee is working for an employer who is covering them with workers' compensation, the employee cannot sue the employer. He can sue third parties. If the employer is not covering the employees with workers' compensation, he is violating the law, then the employee can sue the employer. If the employee sues the employer under traditional negligence law, the employer does not have the defense of either contributory negligence or comparative negligence. That is one of the things this bill is designed to do; which is to say that the employer does have the comparative negligence defense. He can say that part of the fault lies with the employee.

REP. KOTTEL said her understanding was that the new section 2 repeats exactly what the law already does, but the way it is worded now, if an employer does not offer workers' compensation, an injured employee cannot sue under the scaffolding act to recover liability insurance for his injuries because of the exceptions on the last line of the amendment. By codifying it she wondered if they had removed a small group of people from having recourse for liability for negligence of the employee (sic).

Mr. MacMaster said he reads the amendment to mean that the contractor, subcontractor or builder are employers who use the scaffolding and are liable except for the fellow employee. "A fellow employee or immediate employer" of the contractor did not make much sense to him. He did not think that takes away an employee's right to sue, but it takes away the right of an employee who is a fellow employee of the boss to sue. He thought the section says "the employee cannot use 27-1-702, MCA, or rather the contractor, subcontractor, builder, employer, can use the comparative negligence statute against his employee."

REP. KOTTEL said they do not know who a fellow employee is.

REP. TREXLER asked if the committee would permit Mr. Hill to explain it from his standpoint.

REP. MC GEE objected.

REP. MC CULLOCH spoke from a layman's point of view that if there are two lawyers at this table who can't agree on what this information means, would the committee be sending out a "muddled" bill for everybody else to be confused.

REP. MC GEE said the bill makes sense. He felt it was easy to define who the people are as discussed in the bill. He felt the bill was simply saying that if an employee takes it upon himself to act out of negligence, that employee shall share part of the damage that he incurred as a result of falling.

REP. KOTTEL said to her it was unclear whether or not the bill supersedes workers' compensation. The Constitution does not require workers' compensation and so it is not a constitutional issue but a statutory issue. New statutes override previous statutes. Since workers' compensation is required by statute and this is a new statute, it is unclear whether this would override the previous statute by superseding the workers' compensation as indicated by its subtitle. Nowhere that she knew of in the statute are the new words, "fellow employee" or "immediate employer," defined. She also saw a problem with the non-delegatability (sic) of responsibility. She felt this statute is unclear and confusing and might very well overturn workers' compensation.

REP. MOLNAR clarified the terminology of the bill from his viewpoint and did not agree that it was "muddy" or unclear as to responsibility and it would allow for looking at the total aggregate of who is responsible.

REP. GRIMES referred to the new language of the bill in the amendment. He said he could understand what it was saying and that he believed it followed the sponsor's intent.

REP. KOTTEL discussed the concept of negligence per se and explained the difference between that and strict liability. She would strongly vote against the change in the law provided by this amendment.

REP. LOREN SOFT asked if any business in Montana could operate without workers' compensation.

Mr. MacMaster said the state workers' compensation law mandates that employers cover their employees with workers' compensation and very few are excepted from that. There are penalties for not complying with that law. He reiterated the employee's recourse in an injury when an employer had not carried workers' compensation insurance on him. Most of this bill simply codifies that right; this bill states it is subject to 27-1-702, MCA. Court case law says the employer cannot use the defense of comparative negligence. Under this bill an employer can.

Vote: The motion carried 14-4 by roll call vote.

Motion: REP. CAREY MOVED TO ADJOURN.

{Comments: This set of minutes is complete on one 60-minute tape.}

HOUSE OF REPRESENTATIVES

Judiciary

ROLL CALL

DATE 1/27/25

NAME	PRESENT	ABSENT	EXCUSED
Rep. Bob Clark, Chairman	✓		
Rep. Shiell Anderson, Vice Chair, Majority	✓		
Rep. Diana Wyatt, Vice Chairman, Minority		✓	
Rep. Chris Ahner	✓		
Rep. Ellen Bergman	✓		
Rep. Bill Boharski	✓		
Rep. Bill Carey	✓		
Rep. Aubyn Curtiss	✓		
Rep. Duane Grimes	✓		
Rep. Joan Hurdle	✓		
Rep. Deb Kottel	✓		
Rep. Linda McCulloch	✓		
Rep. Daniel McGee	✓		
Rep. Brad Molnar	✓ late	✗	
Rep. Debbie Shea	✓		
Rep. Liz Smith	✓ late	✗	
Rep. Loren Soft	✓		
Rep. Bill Tash	✓		
Rep. Cliff Trexler	✓		



HOUSE STANDING COMMITTEE REPORT

January 27, 1995

Page 1 of 1

Mr. Speaker: We, the committee on Judiciary report that House Bill 158 (first reading copy -- white) do pass as amended.

Signed: Bob Clark
Bob Clark, Chair

And, that such amendments read:

1. Page 1, lines 22 through 25.

Strike: "subject to" on line 22 through "construction of" on line 25

Insert: "when the damages are caused by negligence of the contractor, subcontractor, or builder in the use or construction of the scaffold, subject to the application of 27-1-702, for damages sustained by any person, except a fellow employee or immediate employer, who uses"

-END-

mm
1/30
Committee Vote:
Yes 14, No 4.

231400SC.Hdh

HOUSE OF REPRESENTATIVES

ROLL CALL VOTE

Judiciary Committee

DATE 1/27/95 BILL NO. ^{HB} 158 NUMBER _____

MOTION: DO PASS AS AMENDED

NAME	AYE	NO
Rep. Bob Clark, Chairman	✓	
Rep. Shiell Anderson, Vice Chairman, Majority	✓	
Rep. Diana Wyatt, Vice Chairman, Minority		
Rep. Chris Ahner	✓	
Rep. Ellen Bergman	✓	
Rep. Bill Boharski	✓	
Rep. Bill Carey		✓
Rep. Aubyn Curtiss	✓	
Rep. Duane Grimes	✓	
Rep. Joan Hurdle		✓
Rep. Deb Kottel		✓
Rep. Linda McCulloch		✓
Rep. Daniel McGee	✓	
Rep. Brad Molnar	✓	
Rep. Debbie Shea	✓	
Rep. Liz Smith	✓	
Rep. Loren Soft	✓	
Rep. Bill Tash	✓	
Rep. Cliff Trexler	✓	

absent

Properly Voted
attached

EXHIBIT 1
DATE 1/27/95
HB 158

(1) As used in this part, "scaffold" or "scaffolding" means
a temporarily elevated platform, and its supporting structure AND
ANY LADDER OR OTHER MECHANISM USED TO REACH THE PLATFORM that is
used for supporting a person, material, or both. The term does
not include a-ladder-or-other mobile construction equipment.

(2) A person working on or near a scaffold shall MUST follow
the safety practices commonly recognized in the construction
industry and the safety regulations required by the person's
employer. EMPLOYEES INVOLVED IN ERECTING OR USING A SCAFFOLD
MUST BE INSTRUCTED BY THE EMPLOYER IN APPROPRIATE SCAFFOLD
ERECTION AND USE. EMPLOYERS MUST FOLLOW SAFETY PRACTICES
COMMONLY RECOGNIZED IN THE CONSTRUCTION INDUSTRY, AS WELL AS
APPLICABLE SECTIONS OF THE STATE AND FEDERAL OCCUPATIONAL SAFETY
ACTS.

EXHIBIT 2
DATE 1/27/95
HB 158

Proposed Sponsored Amendment to HB 158

1. Page 1 Line 21 following "exceptions. (1)" strike the remainder of line 21 through 25 and insert:

"A contractor, subcontractor, or builder who uses or constructs a scaffold on a construction site is liable, when the damages are caused by the negligence of the contractor, subcontractor, or builder in the use or construction of the scaffold, subject to the application of 27-1-702, for damages sustained by any person, except a fellow employee or immediate employer who uses the scaffold."

Mike Young Atty
Ron McCulloch
Loren Darby - Contract.

strict liability - defense of contributory negligence is involved.

Bill Barrett - Ins Agent

negligence w/ breach of duty - have to find a violation or fault.

James F. Smith Ins Agent - availability of Ins.

Roger McGlen - Ex. Dir. Ins.

Ron Ashbrenner

Carl Schwitzer - MT Contractors Assoc.

Mike Young
human error applies to everything - the only thing 100% certain

Darrel ~~Boyer~~ ^{Adler} AFL CIO. ^{may I HAVE - your.} ^{omitting LADDERS.}
Contract person for Mont CEH

NOT uncommon - Hanging Scaffold - ladder can be integral part of scaffolding.

Russell Hill - ~~MTLA~~ MTLA

Carl -

Tool Box meeting -

Directors:

Wade Dahood
 Director Emeritus
 State D. Beck
 Elizabeth A. Best
 Michael D. Cok
 Mark S. Connell
 Michael W. Cotter
 Patricia O. Cotter
 Karl J. Englund
 Robert S. Fain, Jr.
 Victor R. Halverson, Jr.
 Gene R. Jarussi
 Peter M. Meloy
 John M. Morrison
 Gregory S. Munro
 David R. Paoli
 Michael E. Wheat

Montana Trial Lawyers

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January 23, 1995

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 William A. Rossbach
 Governor
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 Governor

Rep. Bob Clark, Chair
 House Judiciary Committee
 Room 312-1, State Capitol
 Helena, MT 59620

RE: HB 158

Mr. Chair, Members of the Committee:

Thank you for this opportunity to express MTLA's opposition to House Bill 158, revising state scaffolding laws. If SB 158 operates as its proponents apparently intend, it will raise workers compensation costs in Montana by increasing serious injuries and decreasing subrogation payments to workers-compensation insurers.

MTLA believes, however, that SB 158 will not operate as its proponents intend and may, in fact, remove whole categories of employees from Montana's workers compensation system and subject their employers to civil liability.

Background. Montana's scaffolding laws, codified at Sec. 50-77-101 et seq., MCA, were first enacted before the advent of workers compensation in the state. The rationale behind those scaffolding laws remains as true today as then: working at great heights is extremely dangerous, and injuries caused by falls are extremely costly. Moreover, workers frequently exercise less control over their own safety at great heights than their employers do. Consequently, as Gov. Racicot correctly emphasizes, preventing such workplace injuries in the first place makes enormous sense.

Negligence per se. Proponents of HB 158 apparently believe that Sec. 50-77-101, MCA, creates strict liability for injuries whenever a contractor, subcontractor, or "builder" violates the statute. MTLA disagrees. A violation of Sec. 50-77-101, MCA, creates negligence per se, not strict liability. The difference is substantial. Strict liability subjects a defendant to liability *even when that defendant took all possible care*. Negligence per se, however, simply means that, when the defendant violates a statute specifically designed to protect a specific plaintiff, then legally that defendant is

responsible for *some* degree of negligence. MTLA believes, however, that:

- SB 158 does not remove scaffolding-law violations from the application of negligence per se.

- The statutory duty of a contractor, subcontractor, or "builder" to provide safe scaffolding also arises from other statutes which SB 158 ignores, such as Sec. 50-71-201, MCA.

- Negligence per se does not defeat the applicability of comparative negligence (i.e., reducing a plaintiff's damages to reflect his/her own fault). MTLA has been unable to find any Montana statute or court decision which prevents judges or juries from considering the negligence of workers in scaffolding-accident cases. To the contrary, the Montana Supreme Court in *Mydlarz v. Palmer/Duncan Construction Co.*, 682 P.2d 695, 703 (1984), expressly held: "Liability does not become fixed upon the showing of a scaffolding-associated injury." A plaintiff must still demonstrate that the violation caused the injury.

Non-delegable duties. Moreover, despite the intentions of proponents, SB 158 does not alter Montana law making certain duties of contractors, subcontractors, and "builders" *non-delegable*. For instance, the non-delegable duty of a contractor or subcontractor to protect the safety of workers often arises from contract, i.e. between an owner and general contractor. SB 158 would not affect these duties.

More importantly, as the Montana Supreme Court recognized in *Stepanek v. Kober Construction*, 191 Mont. 430 (1981), the adoption in 1972 of Montana's new Constitution clearly prevented owners, general contractors, subcontractors, "builders" and the like from delegating a duty of safety to employees covered by workers compensation. Article II, Section 16 of the Montana Constitution protects an employee's "immediate employer" from civil liability if that employer provides workers compensation coverage. But that Constitutional provision also makes certain employment-related duties non-delegable since workers compensation is a no-fault system; since remote owners/general contractors/etc. could easily subvert the constitutional language if they could delegate their duties down the line to an "immediate employer"; and since "immediate employers" shielded from liability by workers compensation obviously have much less incentive to prevent the type of workplace injuries addressed by scaffolding laws.

House Bill 158. Aside from the intention of its proponents, MTLA believes that House Bill 158 contains serious problems, including:

- The definition of "scaffold" and "scaffolding." HB 158, for example, doesn't limit this definition to construction-related activities. Temporary shelving and car jacks fall within the definition. The specific exclusion for ladders indicates that, without such an exclusion, equipment similar to ladders should be included. And the exclusion for "other mobile construction equipment" is terribly broad--broad enough to include even mobile scaffolding, precisely the type of equipment which the statute presumably intends to address.

- **Section 1, subsection (2).** By imposing a statutory duty of care on employees, this section conflicts with Montana's no-fault workers compensation scheme, at least regarding "immediate employers."

- **The phrase "person working on or near a scaffold."** This language imposes a duty on employees to follow complex safety practices designed to apply to industry employers. This language also applies to any employer "working on or near" a scaffold. The language is not limited to scaffolding-related safety practices and regulations.

- **The phrase "safety practices commonly recognized in the industry."** This language would replace the current duty of a contractor, subcontractor, or "builder" to exercise reasonable care in the matter of scaffolding with a statutory duty to follow an incredibly complicated array of safety practices detailed by such industry experts as the American National Standards Institute (ANSI), the National Safety Council (NSC), Underwriters Laboratories (UL), the American Society of Safety Engineers, the Institute for Product Safety, and even individual scaffolding manufacturers and OSHA.

- **The phrase "safety regulations required by the person's employer."** This language makes no provision for instances in which industry safety practices and employer safety regulations are inconsistent or even contradictory. *At minimum, SB 158 should clarify that an employee is not negligent if he/she is following the orders or safety regulations of an employer.*

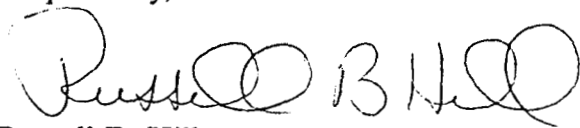
- **Section 2, subsection (1).** This language makes an employer liable for negligence. It unreasonably limits the scope of this section to contractors, subcontractors, and something called "builders," thus relieving such entities as owners from the duties imposed by current law.

- **The phrase "who uses or constructs a scaffold on a construction site."** This language extends to any person (not just employers or employees) who uses or constructs the scaffold, but it abolishes the protections in current law for such entities as passersby.

- **The phrase "except a fellow employee or immediate employer."** This language, taken from Montana's Constitution where it applies to the legal redress available to employees, makes little sense here where it applies to the duty of employers.

If I can provide additional information or assistance to the Committee, please allow me to do so. Thank you again for this opportunity to express MTLA's opposition to House Bill 158.

Respectfully,



Russell B. Hill
Executive Director

Proposed Sponsored Amendment to HB 158

1. Page 1 Line 21 following "exceptions. (1)" strike the remainder of line 21 through 25 and insert:

"A contractor, subcontractor, or builder who uses or constructs a scaffold on a construction site is liable, when the damages are caused by the negligence of the contractor, subcontractor, or builder in the use or construction of the scaffold, subject to the application of 27-1-702, for damages sustained by any person, except a fellow employee or immediate employer who uses the scaffold."

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David R. Paoli
Michael E. Wheat

January 26, 1995

Rep. Bob Clark, Chair
House Judiciary Committee
Room 312-1, State Capitol
Helena, MT 59620

RE: HB 158

Mr. Chair, Members of the Committee:

Thank you for this opportunity to supplement--and correct--MTLA's written testimony to this committee regarding HB 158 on January 24, 1994.

1. As MTLA testified, Scaffolding Act cases do hinge on "negligence per se."
2. As MTLA testified, Scaffolding Act cases do consider the carelessness/fault of injured employees, because:
 - "Negligence per se" only applies when an employer violates a Scaffolding Act requirement *which was designed to prevent the type of injury which occurred*. Clearly, for example, the Montana Legislature intended guard rails on scaffolding to prevent accidental falls. But just as clearly, the Montana Legislature did not intend guard rails to prevent employees from intentionally throwing themselves from scaffolds, and did not intend guard rails to absolutely guarantee the safety of drunk employees. In such cases, the fault of employees would bar recovery.
 - "Negligence per se" *only applies when the violation of a Scaffolding Act requirement actually caused the injury*. If the violation had nothing to do with the injury--if, for example, the injured employee's carelessness and not the violation caused the injury--then the Scaffolding Act imposes no liability on the employer.

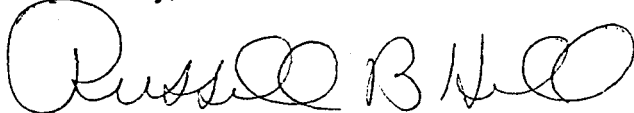
3. Nevertheless, once a court or jury finally applies negligence per se to an employer, then Mr. Young's testimony regarding Scaffolding Act cases is correct: the employer cannot at that stage reduce compensation by comparing its own fault to that of the employee.

Consequently, MTLA's testimony on January 23 at page 2, lines 7-8, regarding comparative negligence is incorrect to the extent that it refers to Scaffolding Act cases. I apologize for that misstatement. I respectfully ask this committee to accept my correction.

4. Still, as MTLA testified, Montana law prohibits consideration of an employee's contributory negligence (along with other historical defenses to a workers compensation claim) not just because of Sec. 50-77-101, MCA, but also *because of the "immediate employer" language in the Montana Constitution, Art. II, Sec. 16.* Consequently, MTLA continues to believe that HB 158 will not alter constitutional, non-delegable imperatives by simply amending Sec. 50-77-101, MCA.

If I can provide additional information or assistance to the Committee, please allow me to do so. Thank you again for this opportunity to clarify MTLA's opposition to House Bill 158 and correct my mistake.

Respectfully,

A handwritten signature in dark ink, appearing to read "Russell B. Hill". The signature is fluid and cursive, with the first name "Russell" being more prominent and the last name "Hill" following in a similar style.

Russell B. Hill
Executive Director

HEARING ON HB 158

SENATOR SHARON ESTRADA ASSUMED THE CHAIR.

Opening Statement by Sponsor:

REPRESENTATIVE DAN FUCHS, House District 14, representing the N.E. corner of Billings, Shepherd and Broadview, sponsored HB 158. He was asked to present the bill on behalf of the Montana Contractors' Association. HB 158 is an act re-defining and clarifying the definition of a scaffold. Also, he said, the bill would allow for the use of comparative negligence in determining liability and provides an immediate effective date. The bill received some opposition from the AFL-CIO and The Trial Lawyers Association in the House hearing, but since that time he worked with REPRESENTATIVE RYAN on behalf of the AFL-CIO and labor. They had consequently added an amendment, which was Subsection 2, Section 1.

Proponents' Testimony:

Ron McCullough, Executive Vice President, Sletten Construction Company, Great Falls, said he was fully in support of HB 158. The other commercial contractors they compete with were also in favor of the bill, he said. Even if he were a single-person small contractor, he would also support the legislation. The bill is an effort to make work under the scaffolding act more reasonable. Other states with a similar act have either repealed it completely or found it has lost useful effects. Currently there are more pressing issues as relating to OSHA and MSHA. Scaffolding at one time was one of the most unsafe construction practices, but in today's work, emphasis and time put on scaffolding and erection and maintenance is of utmost importance to all trades working on scaffolding. The restrictions from OSHA and from private owners put on contractors to maintain safe scaffolding are well-stated and respected. No one wants to see injury on projects, he stated, and great improvements have been made in the area.

Helen Christensen appeared to represent the Montana State AFL-CIO and Don Judge, the Executive Secretary, who was unable to attend. She submitted and read from written testimony. (EXHIBIT 2)

Jacqueline Lenmark, representing the American Insurance Associates (AIA), supported the passage HB 158. They also supported the amendments from the AFL-CIO. She told the committee that the AIA is strongly in support of safety as an important component in keeping down risk and losses in any situation where they would provide insurance. The Montana Scaffolding Act has been historically one of the most restrictive in the nation. There were few instances in the code where strict liability was imposed on any party who may be liable without applying the principles of comparative negligence. What that meant in terms of insurance, she said, was that the insurance

would cost more, and would be less available. They supported the adoption of comparative negligence principles into the law. It was a fairness issue and will also have the effect of making insurance more affordable and available to general contractors, who now are having difficulty in obtaining insurance needed. She had one small amendment to propose, she said. (EXHIBIT 3) She said the bill as it came from the House specified Section 27-1-702. The organization thought the bill would be better drafted and more susceptible to fair interpretation if it included the entire part 7 of Title 27, Chapter 1.

Joe Hansen, representing Edsall Construction as President, told the committee of an incident. They had an incident of a sub-sub-contractor operating a man-lift. The operator moved the lift in an upright position when it was fully extended, dropped one wheel into a drain and came tumbling off the lift, causing severe injuries. This is not a safe practice, he said. Because of the Montana Scaffolding Act, their company faces the entire cost of that incident, whereas if they had comparative negligence, perhaps their costs would not have been so extreme. He supported HB 158.

Lorrin Darby, Cogswell Agency, Great Falls, whose company insures and bonds a number of Montana contractors doing business in the state, encouraged passage of HB 158. They have had a number of cases where the contractors were unable to show, because of the existing law, any negligence on the part of the injured party, even if they were 100 per cent negligent. In the 1920's when the bill was enacted, scaffolding was constructed on-site with wood and planks and there were unsafe conditions and practices. The law was extremely needed. However, with modern scaffolding and equipment, and with the enactment of all the present safety culture from OSHA, the General Contractors' own safety committees, and the owners' requirement of safety engineers on jobs, scaffolding is not unsafe as it was in early days. He said that they had seen a drastic reduction in the availability of the insurance companies that are willing to insure general contractors especially if they sub-contract a large portion of their jobs. There is little or no insurance premium on the sub-contractor work for the general contractor and yet the insurance company on the general liability faces a chance of a large lawsuit settlement. They had a number of the cases, and it has come to the place where the insurance companies don't even offer defense, they just settle, because of the interpretation of the law. He urged passage of the bill.

Mark Agather, President, Glacier Insurance, said he was a native Montanan and had been in the insurance business for 23 years, 18 of which he worked for Glacier Insurance in Kalispell. He submitted and read from written testimony. (EXHIBIT 4)

Roger McGlenn, Executive Director of the Independent Insurance Agents Association of Montana, supported the legislation for all

the reasons they had just heard. He urged a Do Pass recommendation.

Ron Ashabraner, represented State Farm Insurance Companies. He said that State Farm Insurance was the largest property and casualty carrier for homeowners in the State of Montana. He said the scaffolding act also applies to homeowners. He had numerous cases in which private homeowners were impacted by the scaffolding act as it so exists, that they had either no control over or no negligence whatsoever. Therefore, he urged the passage of HB 158.

Carl Schweitzer represented the Montana Contractors' Association, said his organization fully supported the bill and the amendment from the AFL-CIO offered, as well as the one offered by **Ms. Lenmark of the AIA.** Montana had copied the original scaffolding act after an Illinois act in the early 1900's, he said. Illinois legislature recently repealed their entire scaffolding act because of the same problems with comparative negligence vs. total negligence. He urged support.

Opponents' Testimony:

Russell Hill, representing the Montana Trial Lawyers Association, read from written testimony. (EXHIBIT 5)

Questions From Committee Members and Responses:

SENATOR HALLIGAN asked the sponsor if he was in agreement with the proposed amendments. **REPRESENTATIVE FUCHS** said he would defer to **Carl Schweitzer** who had seen them and supported them. **SENATOR HALLIGAN** asked about the ladder amendment from the AFL-CIO. **Mr. Schweitzer** said that when a ladder is an integral part of the scaffolding, it should be included as part of the scaffolding act. They agreed to the amendment, he said. When asked about the Workers' Compensation aspect by **SENATOR HALLIGAN,** **Mr. Schweitzer** stated they were not talking about Workers' Comp., but rather third-party lawsuits where the injured person may be covered by Workers' Comp., but they can come back and sue the general contractor. This is where comparative negligence cannot be brought back into the lawsuit, he said, even if the injured party did not fulfill safety requirements and were given a safe working arena. **SENATOR DOHERTY** asked if it would be a strict comparative negligence. If the contractor was over 50 per cent negligent, would the injured worker be able to obtain full legal redress? **Jacqueline Lenmark** answered no. The regular principals would be applied to the scaffolding act action as in any other lawsuit. She said the contractor would be liable and once damages were determined, they would be reduced proportionately in accordance with each parties' portion of negligence. **SENATOR HOLDEN** asked **Ms. Lenmark** about her amendment. **Ms. Lenmark** said that 27-1-702 is a specific section that sets out the general principal of comparative negligence. There were other sections that amplified how that concept should be applied in any given

lawsuit. The purpose of the amendment was to make it clear that the entire part applies and not just the one section that identifies comparative negligence. **SENATOR HOLDEN** asked the sponsor if he was in agreement with the amendment and the answer was yes. **SENATOR HALLIGAN** said the definition in existing law is very specific as it appears to the construction industry. The new definition, "an elevated platform," would apply to any elevated platform and not just the industry. He wondered why they were changing the expanding breadth of the definition. **Ms. Lenmark** replied that the liability issue is what they were trying to address. The purpose of the bill is to confine it to the construction situations and not auto repair or some other areas. She thought the problem would be addressed in taking the liability section along with the scaffolding language. She wanted to take a second look at **Mr. Hills's** amendments.

Closing by Sponsor:

REPRESENTATIVE FUCHS said he had complete confidence in the committee in adopting the amendments. He asked for a Be Concurred In recommendation to HB 158.

HEARING ON HB 250

Opening Statement by Sponsor:

REPRESENTATIVE LINDA McCULLOCH, House District 70, Western Missoula County, presented HB 250. HB 250 addresses the problem of overcrowded jail cells, she said. In current law, if a person commits a misdemeanor under Chapter 61, such as following too closely, failing to stop at a stop sign or a muffler violation, and then fails to pay the fine, the person can be then be imprisoned for each violation. In the event that the person cannot pay the fine imposed, if this bill is passed, the court may sentence the offender to two alternatives other than imprisonment in the county jail. The first alternative is community service. The second alternative provides for the garnishment and attachments of property. If the community service is inappropriate and if property is not found in an amount necessary to satisfy the unpaid portion of the fine, then the court still have the option of imprisonment in the county jail. The new law would apply only to two chapters of the law, both contained in Title 61, Chapter 8, entitled, "Traffic Regulations," and in Chapter 9, entitled, "Vehicle Equipment." This bill would not apply to any provisions in those chapters which carry with them their own penalties, such as driving under the influence of drugs or alcohol, or reckless driving. It would not change the penalties for those offenses. There is no fiscal impact on either state or local government expenditures, although there may be some reduction in the cost incurred from incarceration in county jails due to a reduced number of imprisonments.

DATE _____

3-2-95

SEN:1995
wp.rollcall.man



Montana State AFL-CIO

Donald R. Judge
Executive Secretary

110 West 13th Street, P.O. Box 1176, Helena, Montana 59624

SENATE JUDICIARY COMMITTEE 406-442-1708

EXHIBIT NO. 2
DATE 3-2-95
FILE NO. HB 158

**TESTIMONY OF DON JUDGE, EXECUTIVE SECRETARY
MONTANA STATE AFL-CIO
ON HOUSE BILL 158
BEFORE THE SENATE JUDICIARY COMMITTEE,
Thursday, March 2, 1995**

Mr. Chairman, members of the committee, my name is Don Judge representing the Montana State AFL-CIO in support of the bill as amended.

After the number of scaffolding accidents in the last few years in Montana, we who work in the building and construction trades had hoped to see a scaffolding bill in the 1995 Legislature. However, we had hoped it would be an improvement in the law focusing on higher safety standards, not a setback in the law making life harder for injured workers.

As originally written, we had opposed this bill because of the need to improve, not degrade, Montana's scaffold laws. However, amendments approved by the House have improved the bill to the point that we can support it.

We do have an additional, simple amendment to the bill that will solidify our support for it even more.

We believe the bill should be amended to make it clear that ladders or other equipment that are the exclusive access route to the scaffold should be considered a part of the scaffold under the law. Quite simply, if I climb over the edge of the basket on the man-lift to step over to the scaffold platform and then fall off, that should be considered a scaffold-related accident. Our intention here is to make this applicable ONLY when there is no other way to reach the work platform on the scaffold.

Mr. Chairman, members of the committee, with this amendment, and with those approved already by the House, we support House Bill 158 and urge the committee give it a "do pass" recommendation.

Thank you.

AMENDMENTS TO HB 158

PREPARED BY JACQUELINE LENMARK

FOR THE AMERICAN INSURANCE ASSOCIATION

1. Page 1, line 30
Following: "APPLICATION OF"
Strike: "27-1-702"
Insert: "comparative negligence principles as provided in Title
27, Chapter 1, part 7"

Glacier
Insurance



SENATE SUBCOMMITTEE

EXHIBIT NO. 4

3-2-95

HB 158

& Financial Strategies

17 First Avenue East • Kalispell, Montana 59901 • 406 752-8693 • FAX 406 756-8897

TESTIMONY
SCAFFOLDING ACT HB 158

I am Mark A. Agather. I am the President of Glacier Insurance and a native Montanan. I have been in the insurance business for 23 years and have been with Glacier Insurance for 18 years.

At the present time, insurance nationwide and in the state of Montana is very competitive. There are many markets for the majority of the businesses in our state and the pricing is extremely competitive. However, there is one glaring exception to this statement and that is insurance in regards to the construction industry and specifically, for our general contractors in the state.

Here, the market is thin - there are very few companies willing to quote on general contractors and those that are quoting have expressed some reservations from time to time. The companies tell me of two major areas that they are concerned with, which lead to the reluctance to quote general contractors. The first reason is the Scaffolding Act and the second is the doctrine of safe work place.

The Scaffolding Act, as now written, holds general contractors to a strict liability for any accident involving an employee on a scaffold. This means that it's not a matter of who is at fault for the accident, the general contractor will pay regardless. Secondly, the definition of scaffold has been expanded in our state to include just about every type of climbing device, even ladders in some situations. Consequently, companies are faced with the possibility of large law suits and subsequent large judgements, making the pricing of their product extremely difficult.

Scaffolding Act
Page 2

Eventually, the insurance market place will tighten. There will be fewer companies quoting our businesses in the state and the pricing will be higher. Our general contractors will be perceived as marginal businesses by the insurance industry. They will be the first to suffer the consequences of a tighter market place. Availability will become increasingly more scarce.

Since the construction industry is vital to the economy of the state of Montana, I support the Scaffolding Act. It will bring us more in line with the rest of the country and will promote the availability of insurance for our general contractors.

Sincerely yours,

Mark A. Agather, CPCU
President
GLACIER INSURANCE, INC.

DATE 3-2-95HB 158

Officers:

Gregory S. Munro
President
Michael E. Wheat
President-Elect
Gene R. Jarussi
Vice President
John M. Morrison
Secretary-Treasurer
William A. Rossbach
Governor
Paul M. Warren
Governor

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March 2, 1995

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Sen. Bruce Crippen, Chair
Senate Judiciary Committee
Room 325, State Capitol
Helena, MT 59620

RE: HB 158

Mr. Chair, Members of the Committee:

Thank you for this opportunity to express MTLA's opposition to House Bill 158, revising state scaffolding laws. Even if HB 158 operates as its proponents apparently intend, it will raise workers compensation costs in Montana by increasing serious injuries and decreasing subrogation payments to workers-compensation insurers. MTLA believes, however, that HB 158 will not operate as its proponents intend.

Background. Montana's scaffolding laws, codified at Sec. 50-77-101 et seq., MCA, were first enacted before the advent of workers compensation in the state. The rationale behind those scaffolding laws remains as true today as then: working at great heights is extremely dangerous, and injuries caused by falls are extremely costly. Moreover, workers frequently exercise much less control over their own safety at great heights than their employers do. Consequently, as Gov. Racicot correctly emphasizes, preventing such workplace injuries in the first place makes enormous sense.

Negligence per se. Sec. 50-77-101, MCA, the Montana Scaffolding Act provision which would be amended by HB 158, does not create strict liability for injuries whenever a contractor, subcontractor, or "builder" violates the statute. A violation of Sec. 50-77-101, MCA, creates negligence per se, not strict liability. As the Montana Supreme Court expressly held in *Mydlarz v. Palmer/Duncan Construction Co.*, 682 P.2d 695, 703 (1984), "Liability does not become fixed upon the showing of a scaffolding-associated injury." A plaintiff must still demonstrate that the violation caused the injury. See also *Steiner v. Department of Highways*, 51 St.Rep. 1496 (1994).

Significantly, HB 158 itself still imposes a mandatory duty upon employers and thus

would not remove scaffolding-law violations from the application of negligence per se. Moreover, the statutory duty of a contractor, subcontractor, or "builder" to provide safe scaffolding also arises from other statutes which HB 158 ignores, such as Sec. 50-71-201, MCA.

Non-delegable duties. HB 158 does not alter Montana law making certain duties of contractors, subcontractors, and "builders" *non-delegable*. For instance, the non-delegable duty of a contractor or subcontractor to protect the safety of workers often arises from contract, i.e. between an owner and general contractor. HB 158 would not affect these duties.

More importantly, as the Montana Supreme Court recognized in *Stepanek v. Kober Construction*, 191 Mont. 430 (1981), the adoption in 1972 of Montana's new Constitution clearly prevented owners, general contractors, subcontractors, "builders" and the like from delegating a duty of safety to employees covered by workers compensation. Article II, Section 16 of the Montana Constitution protects an employee's "immediate employer" from civil liability if that employer provides workers compensation coverage. But that Constitutional provision also makes certain employment-related duties non-delegable since workers compensation is a no-fault system; since remote owners/general contractors/etc. could easily subvert the constitutional language if they could delegate their duties down the line to an "immediate employer"; and since "immediate employers" shielded from liability by workers compensation obviously have much less incentive to prevent the type of workplace injuries addressed by scaffolding laws. As the Montana Supreme Court declared in *Steiner* at page 1498:

"Thus, the distinction discussed in *Stepanek* between third parties and employees of subcontractors no longer applies in Montana and employees of subcontractors may sue the general contractor for injuries received on the job if the general contractor has a nondelegable duty to the subcontractor's employees, notwithstanding the fact that the employee's exclusive remedies against the employer are covered under the Workers' Compensation Act. Because the duties imposed on MDOH by its contract with FHWA are nondelegable, *it cannot avoid liability by attempting to shift responsibility for those duties to someone else*. [cite omitted; emphasis added]

House Bill 158. Aside from the intentions of its proponents to import comparative negligence into Scaffolding Act cases, MTLA believes that House Bill 158 as amended contains numerous serious problems, including:

- **Section 1.** The only scrap of current Sec. 50-77-101, MCA, which would remain after passage of HB 158 would be the section number itself. Yet by amending this statute rather than repealing it, HB 158 would thus preserve *some* elements of the current Montana Scaffolding Act, i.e., previous legislative intentions and judicial precedents addressing circumstances beyond the scope of HB 158 (see comments re: Section 2(1) below).

• The definition of "scaffold" and "scaffolding." HB 158, for example, doesn't limit this definition to construction-related activities. Temporary shelving and car jacks fall within the definition. The specific exclusion for ladders indicates that, without such an exclusion, equipment similar to ladders should be included. And the exclusion for "other mobile construction equipment" is terribly broad--broad enough to include even mobile scaffolding, precisely the type of equipment which the statute presumably intends to address. (See accompanying newspaper photograph, page 4.)

• Section 1, subsection (2). By imposing a statutory duty of care on employees, this section conflicts with Montana's no-fault workers compensation scheme, at least regarding "immediate employers." Additionally, the phrase "safety practices commonly recognized in the construction industry as well as applicable state and federal occupational safety laws" would replace the current duty of a contractor, subcontractor or "builder" to exercise reasonable care in the matter of scaffolding with a statutory duty to follow an incredibly complicated array of safety practices detailed by such industry experts as the American National Standards Institute (ANSI), the National Safety Council (NSC), Underwriters Laboratories (UL), the American Society of Safety Engineers, the Institute for Product Safety, and even individual scaffolding manufacturers and OSHA.

• Section 2, subsection (1). By explicitly addressing the "liability of employer for negligence" and imposing liability for negligence upon contractors, subcontractors, and "builders" (who are often also employers), the bill modifies current workers' compensation law. By importing the phrase "except a fellow employee or immediate employer" from Article II, Section 16 of the Montana Constitution, the bill would strangely transform language applicable to employees into language applicable to contractors, subcontractors, and "builders" (who are often also employers). By restricting application of this subsection to "construction sites," the bill does not extend to non-construction sites where scaffolding injuries occur, i.e., in the course of painting, maintenance, etc. By restricting application of this subsection to contractors, subcontractors, and "builders," the bill does not extend to other entities such as property owners or manufacturers of scaffolding. And by restricting application of this subsection to "any person . . . who uses the scaffold," the bill abolishes protections in current law for such entities as innocent passersby.

If I can provide additional information or assistance, please allow me to do so. Thank you again for this opportunity to express MTLA's opposition to House Bill 158.

Respectfully,

A handwritten signature in dark ink, appearing to read "Russell B. Hill". The signature is fluid and cursive, with the first name "Russell" being more prominent.

Russell B. Hill, Executive Director

DATE MARCH 2, 1995

SENATE COMMITTEE ON Judiciary

BILLS BEING HEARD TODAY: HB 161, HB 158, HB 250
SB 387

< ■ >

PLEASE PRINT

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Check One

Name	Representing	Bill No.	Support	Oppose
Dallas D Erickson	MC DL	161	+	
Patty Walker	Self	387	X	
Jan Renbis	sup. or Tugm band & diestock	387	x	
Russell B Hill	MT Trial Lawyers	HB 158		✓
John Connor	MT County Attys Assn	HB 161	✓	
David Henixon	MT Asso. of Churches	HB 161	✓	
SHARON HOFF	MT CATH. COUF	HB 161	✓	
Helen Christensen	MT State AFL-CIO	HB 158	✓ w/Am	
Mons TELGEN	Teigen L & Ls Co	387	X	
Michael O'Hara	Missoula Sheriff	HB 250	X	
Craig Reap	MHP	HB 250	x	
Dennis McFarle	Yellowstone County Sheriff	HB 250	X	
Chris O'Reilly	L & C Co Sheriff	HB 250	X	
Kathy McGowan	MSPOA	HB 250	✓	

VISITOR REGISTER

PLEASE LEAVE PREPARED STATEMENT WITH COMMITTEE SECRETAR

DATE _____

SENATE COMMITTEE ON _____

BILLS BEING HEARD TODAY: _____

< ■ > PLEASE PRINT < ■ >

Check One

Name	Representing	Bill No.	Support	Oppose
Joe Hansen	Edsall Cons	158	X	
Carl Schweitzer	Mont Cont Agric HB	158	X	
Hard Shanahan / JNTL	Ag. Pres. Assoc. HB 158	HB 158	✓	
Larry Brown	Ag. Pres. Assoc.	SB 387	✓	
Bob Torres	NASW	HB 161	✓	
MARK Simonich	DNRC	SB 387		✓

VISITOR REGISTER

PLEASE LEAVE PREPARED STATEMENT WITH COMMITTEE SECRETARY

DATE March 2, 1995

SENATE COMMITTEE ON _____

BILLS BEING HEARD TODAY: HB 158 HB 250

< ■ > PLEASE PRINT < ■ >

Check One

Name	Representing	Bill No.	Support	Oppose
Roger McGLENN	INDEPENDENT MTS AGENTS ASSOC OF MT	158	X	
MARK AGATHER	SELF	158	X	
RON MCCULLOUGH	SETTLENCORP CO.	158	X	
LORIAN DAWBY	COGSWELL Agency	158	✓	
JAMES CASHELL	MSP/MA	250	X	
Laure Koutnik	Christian Coalition of MT	161	✓	
C Jeff Cox	MTA SELF	387	✓	
Lorna Frank	MT. Farm Bureau	387	✓	
Ron Ashabranner	State Farm Ins	158	✓	
Mary Olive Cook	adm. for MT's Children	161 HB 250	✓	
Arlette Kandash	Eagle Forum	161	✓	
Holly Franz	Mt. Power Co.	SB387	independ- mtd vs 5+6	
Chris Tweeten	Revised Water Rts Comm'n Compact	SB387		without Vamnd
Margulise Denmark	Am. Ins. Assoc.	HB 158	✓	

VISITOR REGISTER

PLEASE LEAVE PREPARED STATEMENT WITH COMMITTEE SECRETARY

Motion: SENATOR HALLIGAN MOVED THAT HB 457 BE CONCURRED IN AS AMENDED.

Discussion: SENATOR NELSON asked about the enforceability of the measure. CHAIRMAN CRIPPEN said it was mentioned in passing. Testimony stated that kids did not believe people about the harmful effects because it was not illegal. SENATOR HALLIGAN said that circumstantial as well as direct evidence can be used. SENATOR HOLDEN said enforceability would not be that big of a problem when the laws were on the books as a deterrent. SENATOR NELSON said that the force of the law would maybe be enough, but it was maybe not going to be enforced if push comes to shove. CHAIRMAN CRIPPEN said the proponents would enforce it. He suggested it would be a good law for the schools to enforce.

Vote: The MOTION CARRIED UNANIMOUSLY on an oral vote. SENATOR HOLDEN offered to carry the bill.

EXECUTIVE ACTION ON HB 158

Discussion: SENATOR BARTLETT offered amendments (EXHIBIT 12) and said that Carl Schweitzer had offered similar amendments (EXHIBIT 13) which she liked better because of the language.

Motion: SENATOR BARTLETT MOVED THE FIRST SET OF AMENDMENTS, EXHIBIT 12.

Discussion: SENATOR BARTLETT said the amendments addressed the concerns raised by the Montana AFL-CIO and echoed by Jacqueline Lenmark from AIA, which make clear that the ladder or other equipment that is the exclusive route of access to the scaffold would be considered part of the scaffold. Rather than specifying a special section of law as applying to the liability, it would be subject to the comparative negligence principals provided in Title 27. The third amendment moves words in the bill to a different section to make the bill better and more clear. The fourth part strikes the language moved in amendment three from the original location. SENATOR HOLDEN asked Mr. Schweitzer if the amendments were O.K. Mr. Schweitzer said they were. SENATOR BARTLETT said she had Ms. Lenmark, Mr. Schweitzer and Mr. Holzer from the AFL-CIO, and Mr. Hill from the Trial Lawyers all review the amendments.

Vote: The MOTION CARRIED UNANIMOUSLY on an oral vote.

Motion: SENATOR BARTLETT MOVED THE AMENDMENT AS CONTAINED IN EXHIBIT 13.

Discussion: SENATOR BARTLETT explained the purpose of the amendment was to make clear that in talking about scaffolding that is on a construction site on this bill.

Vote: The MOTION CARRIED UNANIMOUSLY on an oral vote.

Motion: SENATOR BARTLETT MOVED THAT HB 158 BE CONCURRED IN AS AMENDED.

Discussion: SENATOR BARTLETT said that some of them were still at a loss as to what is meant by the words, "fellow employee," or "immediate employer," since what they were talking about in the bill is a sub-contractor or builder. She said there remains something of a mystery still in this bill.

Vote: The MOTION CARRIED on an oral vote with SENATOR STEVE DOHERTY voting no.

EXECUTIVE ACTION ON HB 547

Discussion: Valencia Lane explained the amendments (EXHIBIT 14). She said amendment 2. on Page 1, Line 14, in the inserting clause, where it refers to rules of the Department of Corrections and Human Services, the Department of Justice wanted to insert, "or the Board of Pardons." If you recall Beth Baker's testimony, she said, there was a recent Montana Supreme Court decision that says a court's incorporating of rules by reference is not sufficient under statutory requirements. A fellow was being prosecuted in federal court for possession of arms in violation of state law. The district court's sentencing order incorporated rules of the Board of Pardons and the Department of Corrections and Human Services. The rule says they cannot possess weapons and firearms. The district court sentencing order simply incorporated all of those rules and others by reference. The question was: was the incorporation by reference sufficient under the state statute to say he had been deprived of his rights and should not have been carrying a firearm and therefore could be prosecuted under federal law? The Montana Supreme Court about 10 days ago, said: no, that an incorporation by reference in a sentencing order by a district court judge is not sufficient to meet the requirements of a state statute. That section of law is 46-18-801, Page 1, Line 13. It says the convicted person could be deprived of any Constitutional rights if they are specifically enumerated in the sentencing order. The district court incorporated the department rules by reference. The Department of Corrections and the Department of Justice are concerned about the effect of that ruling and have asked the committee to amend the bill to 46-18-801. On Page 1, Line 14, the Department's offered amendment would amend existing state law to say that if a district court in sentencing an offender

incorporates rules of the Department of Corrections or the Board of Pardons by reference, that it is sufficient and is a specific enumeration for purposes of this statute.

Motion/Vote: SENATOR BISHOP MOVED THE AMENDMENTS AS CONTAINED IN EXHIBIT 15. The MOTION CARRIED UNANIMOUSLY on an oral vote.

DATE _____

3-7-95

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SENATE STANDING COMMITTEE REPORT

Page 1 of 1
March 8, 1995

MR. PRESIDENT:

We, your committee on Judiciary having had under consideration HB 158 (third reading copy -- blue), respectfully report that HB 158 be amended as follows and as so amended be concurred in.

Signed: _____
Senator Bruce Crippen, Chair

That such amendments read:

1. Page 1, line 16.

Following: "used"

Strike: "for supporting"

Insert: "on a construction site to support"

2. Page 1, line 17.

Following: "term"

Insert: "includes a ladder or other equipment that is the exclusive route of access to the scaffold but"

Following: "include"

Strike: "a"

Insert: "any other"

3. Page 1, line 24.

Following: "(1)"

Strike: "A"

Insert: "Subject to the comparative negligence principles provided in Title 27, chapter 1, part 7, a"

4. Page 1, line 25.

Following: "liable"

Insert: "for damages sustained by any person who uses the scaffold, except a fellow employee or immediate employer"

5. Page 1, line 30 through page 2, line 1.

Following: "SCAFFOLD" on line 30

Strike: remainder of line 30 through "scaffold" on page 2, line 1

-END-



Amd. Coord.

Sec. of Senate

Senator Carrying Bill

541059SC.SPV

Amendments to House Bill No. 158
Third Reading Copy (blue)

DATE 3-7-95FILE NO. HB 158

Requested by Senator Bartlett
For the Committee on Judiciary

Prepared by Valencia Lane
March 4, 1995

1. Page 1, line 17.

Following: "term"

Insert: "includes a ladder or other equipment that is the
exclusive route of access to the scaffold but"

Following: "include"

Strike: "a"

Insert: "any other"

2. Page 1, line 24.

Following: "(1)"

Strike: "A"

Insert: "Subject to the comparative negligence principles
provided in Title 27, chapter 1, part 7, a"

3. Page 1, line 25.

Following: "liable"

Insert: "for damages sustained by any person who uses the
scaffold, except a fellow employee or immediate employer,"

4. Page 1, line 30 through page 2, line 1.

Following: "SCAFFOLD" on line 30

Strike: remainder of line 30 through "scaffold" on page 2, line 1

Amendments to HB 158

SENATE JUDICIARY COMMITTEE
SENATE NO. 12
DATE 3-7-95
FILE NO. HB 158

1. Page 1 Line 16 following: "use~~s~~"
Strike: "for supporting"
Insert: "on a construction site to support"

This amendment is to address the concerns on the Montana Trial Lawyers that non-construction activities such as temporary shelving and car jacks would be included within the definition of scaffold.